United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7154

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Eldad W. Brophy, Husband

v.

The State of New Hampshire,
Graper and Swanson, Professional Association
and as Individuals,
and Ann Brophy, Wife

BRIEF FOR THE STATE OF NEW HAMPSHIRE

STATEMENT OF FACTS

The Plaintiff, Eldad Brophy, alleges that he is a "resident pro tem" of the State of Vermont. He does not allege that he is a resident of that State. In 1975, while both parties resided in the State of New Hampshire, Plaintiff's former wife, Ann Brophy, obtained a decree of divorce pursuant to RSA 458:7-a (Supp. 1975) from the Superior Court of Rockingham County, New Hampshire on the grounds of irreconcilable differences. Plaintiff was given an opportunity to be heard and chose not to contest the divorce or the stipulations regarding custody and alimony. Mrs. Brophy was represented in the divorce action by the Defendant, Graper and Swanson, Professional Association, a New Hampshire Corporation. Over a year later, Plaintiff brought suit in the United States District Court for the District of Vermont for damages and injunctive relief against the State of New Hampshire, Ann Brophy and

Graper and Swanson, Professional Association and Glen E. Graper and Dale T. Swanson in their individual capacities. Ann Brophy, Glen E. Graper and Dale T. Swanson are all New Hampshire residents. His complaint against the State of New Hampshire alleges that the authorization for divorce in New Hampshire RSA Chapter 458 violates his constitutional rights under the First and Fourteenth Amendments and "other statutory and civil rights" which are not specified.

STATEMENT OF THE CASE

On October 19, 1976 Plaintiff filed a complaint in the United States District Court for the District of Vermont, seeking to have the Court declare New Hampshire Divorce Laws unconstitutional, declare his divorce null and void, and order reconciliation between himself and his former wife. He also asked for damages against the State of New Hampshire in the amount of $10,000,000 and against Graper and Swanson, Professional Association, and Glen E. Graper and Dale T. Swanson, individually, in the amount of $2,000,000.

All of the Defendants filed motions to dismiss for lack of jurisdiction, improper venue, and failure to state a claim upon which relief could be granted. Chief Justice James S. Holden granted the dismissal on February 2, 1977 on the grounds of lack of jurisdiction and improper venue.

On March 3, 1977 Plaintiff appealed to this Court, and his Brief and a six page Appendix were filed on April 29, 1977. The Appendix was prepared solely by Plaintiff's attorney without contacting Defendant. Defendant, the State of New Hampshire, did not receive a copy of the Plaintiff's Brief and Appendix until May 17, 1977.

ISSUES ON APPEAL

The issues before the Court on appeal are as follows:

1. Whether the District Court properly dismissed Plaintiff's action for lack of personal jurisdiction over the State of New Hampshire;

2. Whether the Complaint was properly dismissed because venue does not rest in the District of Vermont;

3. Whether Plaintiff's Complaint was properly dismissed for failure to state a claim upon which relief can be granted;

4. Whether Plaintiff's token compliance with Rule 30 of the Federal Rules of Appellate Procedure requires summary affirmance or dismissal of the appeal.

I. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S ACTION FOR LACK OF PERSONAL JURISDICTION OVER THE STATE OF NEW HAMPSHIRE.

The Eleventh Amendment to the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

"The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such federal power that the Constitution was finally adopted." I.C. Warren, The Supreme Court in United States History 91 (Rev. ed. 1937); See also Edelman v. Jordan, 415 U.S. 651 (1974) reh. den. 416 U.S. 1000.

The Eleventh Amendment is a well-established limitation on the constitutional grant of jurisdiction to the federal courts. It has been held to prohibit suits in federal courts against a state by its own citizens as well as by citizens of another state. Hans v. Louisiana, 134 U.S. 1 (1890); Edelman v. Jordan, supra. It acts as an absolute bar to suit unless the state has waived its immunity in cases where the relief sought is monetary damages. Byram River v. Village of Port Chester, 394 F. Supp. 618 (S.D.N Y. 1975); Ford Motor Co. v. Dep. of Treas. of St. of Indiana, 323 U.S. 459 (1945).

The test for determining whether immunity exists in a particular case is a two-faceted one. First, it must be determined whether the action is against the state as a sovereign entity, rather than against one of its officers or agents in his individual capacity. If the action is against the state, the Eleventh Amendment operates to bar suit unless the state has consented to be sued. Ford Motor Co. v. Dept. of Treas. of St. of Indiana, supra. Areojet-General Corp. v. Askew, 453 F.2d 819 (5th Cir. 1971) cert. den. 409 U.S. 892.

Since the State of New Hampshire as a sovereign entity is named as a defendant in this case, the only issue is whether the State of New Hampshire has waived it's immunity and consented to be sued. Such a waiver will not be inferred, but must be explicit and unequivocal. Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944). Knight v. New York, 443 F.2d 415 (2nd Cir. 1971); See also Moore v. Dailey 97 N.H. 278, 86 A.2d 342 (1952); City of Manchester v. Manchester Teachers Guild, 100 N.H. 507, 131 A.2d 59 (1957); Sousa v. State, 115 N.H. 340, 341 A.2d 282 (1975). A state may not be divested of its immunity from suit simply by virtue of the fact that the case is one arising under the Constitution or laws of the United States. Hans v. Louisiana, supra. Parden v. Terminal Ry. of Alabama State Docks Dept., 377 U.S. 184, reh. den. 377 U.S. 1010 (1964). In this case, the State of New Hampshire has done nothing to waive its immunity. The State has neither consented to this suit nor enacted statutes which permit cases such as this against the State.

In his Brief, the Plaintiff appears to argue that this basis for dismissal could be overcome by the joinder of the Governor and Attorney General as parties defendant and argues that the failure to join the Governor and Attorney General was a mere technicality. This is absurd. There is no legal precedent for holding a person liable for legal or equitable relief who has not been made a party to an action. Even if the Governor and Attorney General had been added as parties defendant in their official capacities the Eleventh Amendment would still bar relief. An action for damages against a state official in his official capacity is in essence one for recovery of money from the state. The State, being the real party in interest, would be entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. Ford Motor Co. v. Treasury Dept., supra: Edelman v. Jordan, supra. With respect to the injunctive relief sought, Plaintiff's joinder of the Governor and Attorney General would be a fruitless act since they are not the state officers charged with enforcing the divorce laws of the state. See Ex Parte Young, 209 U.S. 123 (1908). Consequently, the District Court was correct in refusing to assert jurisdiction.

II. THE COMPLAINT WAS PROPERLY DISMISSED BECAUSE VENUE DOES NOT REST IN THE DISTRICT OF VERMONT

Plaintiff alleges in his complaint that "the court has jurisdiction by virtue of the existence of constitutional issues and by virtue of diversity of citizenship". Plaintiff's Complaint, Paragraph 2. By commencing the action in the District of Vermont, he also asserts that venue is proper in that District[1].

Venue in a civil action in which jurisdiction is not founded solely on diversity of citizenship lies in the judicial district where all defendants reside or in which the claim arises, unless otherwise provided by law. 28 U.S.C. §1391(b). The State of New Hampshire obviously does not reside in the State of Vermont. Graper and Swanson Professional Association is a corporation created by New Hampshire law, with offices in Portsmouth, New Hampshire and therefore may be regarded as a resident of New Hampshire. Glen E. Graper resides at 591 Middle Street, Portsmouth, New Hampshire. Dale T. Swanson resides at Mast Road, Lee, New Hampshire. Ann Brophy resides at 97 Portsmouth Avenue, Portsmouth, New Hampshire. Clearly, none of the defendants resides in the District of Vermont and venue in this court could only be based upon allegations that the claim arose in that district. However, Plaintiff alleges that his rights

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[1] Plaintiff makes several arguments in his Brief about the constitutionality of 28 U.S.C. §1391, stating that the costs of defending a divorce action in Florida prevent him from defending the action and consequently violate his constitutional rights to due process of law. These arguments, like most of Plaintiff's Brief, are addressed to the action in Bernstein v. Florida and are inapplicable to this action since Plaintiff's divorce was obtained in New Hampshire while he was a New Hampshire resident. In any event, the correctness of venue in the divorce proceeding is not an issue presently before this Court.

were infringed because of the divorce granted by the Superior Court of New Hampshire sitting at Exeter, New Hampshire. The claim then arose in New Hampshire not in Vermont, and neither basis exists for venue in the District of Vermont.

To the extent that Plaintiff alleges a violation of "civil and statutory rights" (Plaintiff's Complaint, Paragraph 1), the action could be maintained on the basis of diversity of citizenship in the district where either all plaintiffs or all defendants reside. 28 U.S.C. §1391(a). Plaintiff merely alleges that he is a "resident pro tem"of Vermont. For venue purposes in federal district courts, a person is a "resident" of a district in which he is a citizen and is domiciled at the time the action is commenced. Koons v. Kaiser, 91 F. Supp. 511 (S.D.N.Y. 1950), mandamus denied 187 F.2d 1023, cert. den. 340 U.S. 942 (1951); Smith v. Murchison, 310 F. Supp. 1079 (D.C.N.Y. 1970); King v. Wall & Beaver Street Corp., 145 F.2d 377 (D.C. Cir. 1944); 1 Moore's Federal Practice ¶ 0. 142 [5.-1-2]. If Plaintiff is only a temporary resident of Vermont, he is not a resident of Vermont for purposes of venue. King v. Wall & Beaver Street Corp., supra. In addition, the State of New Hampshire cannot be a citizen for purposes of diversity. State Highway Commission v. Utah Construction Co., 278 U.S. 194 (1929); Harris v. Pennsylvania Turnpike Commission, 410 F.2d 1332 (3rd Cir. 1969), cert. den. 396 U.S. 1005 (1970). Consequently, there is no basis on which a claim could properly have been brought before the United States District Court for the District of Vermont.

III. PLAINTIFF'S COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A complaint should be dismissed if it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Church v. Hegstrom, 416 F.2d 449 (2nd Cir. 1969).

Plaintiff's complaint speaks only in sweeping generalities. It alleges unspecified violations of the First and Fourteenth Amendments and other "civil and statutory rights". Plaintiff's Complaint, Paragraph 1. In support of these allegations, Plaintiff alleges that the State of New Hampshire has provided a no-fault divorce procedure which "encourages divorce, discourages reconciliation, and generally contributes to the deterioration of our Society". Plaintiff's Complaint, Count I, Paragraph 12. He further alleges that the judiciary is not qualified to handle fundamental family problems. Plaintiff's Complaint, Count I, Paragraph 11.

It is difficult to conceive of how these statements support Plaintiff's legal claims. The First Amendment, as applied to the States through the Fourteenth Amendment, prohibits the enactment of any law respecting an establishment of religion or prohibiting the free exercise thereof. The "establishment" clause has generally been held to prohibit a state from placing official support behind the tenets of one or all orthodoxies (Engel v. Vitale, 370 U.S. 430 (1962); Gillette v. United States, 401 U.S. 437, reh. den. 402 U.S. 934 (1971)), and the "free exercise"

clause guarantees the right of every person to choose freely his own course with reference to religious training and observance, free of any compulsion from the state. Abington School District v. Schempp, 374 U.S. 203 (1963). In this case, the State of New Hampshire has done nothing either to establish a religion or to restrict anyone's practice of religion. By enacting divorce laws, it has merely defined a procedure by which those of its citizens who so desire may dissolve marriages.

Plaintiff's Fourteenth Amendment claims are equally without merit. Plaintiff alleges no facts which even remotely relate to either the Privileges and Immunities Clause or the Due Process Clause of the United States Constitution. Plaintiff does not claim that he was not provided with adequate notice of actions in any New Hampshire court or with an opportunity to be heard. Neither does he allege different treatment by the State of New Hampshire from that received by other citizens. On the contrary, it is the fact that New Hampshire divorce laws apply to him as well as to all other citizens to which he objects.

IV. PLAINTIFF'S TOKEN COMPLIANCE WITH RULE 30 OF THE FEDERAL RULES OF APPELLATE PROCEDURE REQUIRES SUMMARY AFFIRMANCE OR DISMISSAL OF THE APPEAL.

The Plaintiff's Appendix in this case consists of six pages and contains only the docket entries and the judgment and memorandum order of the District Court. It is clear from the case law that Brophy in filing a six page Appendix, has wholly neglected his duty under Rule 30(a) of the Federal Rules of Appellate Procedure. Rule 30 "...was designed to get before the Court of Appeals such portions of the record as are necessary to understand the issues raised on appeal and relate them to the record in the cheapest and most efficient way without placing any artificial limitation on the matters that can be considered." 9 Moore's Federal Practice §230.02[1] "[T]he system contemplates that each judge of the Court of Appeals who hears the appeal will be able to follow the brief and relate the arguments to the record by reference to the appendix." Id. at 3858. This objective is defected by requiring judges to refer to the entire record because of the inadequacy of an incomplete appendix.

Although on its face the Rule appears to afford an appellant the discretion to determine the "relevant portions of the pleadings, charge, findings, or opinion," that discretion is very narrow indeed and is limited by a realistic assessment of what is necessary to present the Court of Appeals with sufficient information to allow it to review the District Court decision. Thus, in Haddad v. Border Express, 303 F.2d 134 (1st. Cir. 1962), the Court, in construing a predecessor to Rule 30(a) which similarly appeared to

provide an appellant with discretion as to the contents of the appendix, stated:

> On its face these provisions might seem to imply that an appellant's failure to print enough in his record appendix to support his contentions casts the burden on the appellee to supplement the appellant's record appendix. This, however, is not the meaning of the rule. As consistently interpreted by this court the rule means that if an appellant fails to print enough to sustain his contentions, he abides the consequences. The appellee's duty is not to incur the expense at the risk of recoupment by way of costs of printing a record appendix for the appeallant, but only to print matter in refutation of the appellant's contentions, or matter supplying another basis for the ruling, order or judgment of the court below. It is upon appellant that the burden falls of preparing a prima facie complete record. Id. at 136.

It is the appellant's duty to print in the appendix those portions of the record which are essential for the Court to read in order to decide the questions he presents. If he fails to do so, he runs the risk of appearing before the Court on an inadequate record on appeal. ESSO Standard Oil Co. v. Secatore's, Inc. 246 F.2d 17 (1st Cir. 1957), cert. den. 355 U.S. 834.

The Courts of Appeal have consistently warned practitioners that failure to comply with Rule 30 may result in drastic action. Braniff Airways, Inc. v. Curtiss Wright Corp., 411 F.2d 451 (2nd Cir. 1969), cert. den. 400 U.S. 329; EMC Corp. v. Knowles Electric, Inc., 438 F.2d 1220 (4th Cir. 1960); United States v. Lefkowitz, 284 F.2d 310 (2nd Cir. 1960). In Lefkowitz, supra, at 316-317 this Court in referring to a predecessor of Rule 30, Rule 15(b), stated:

> The current failure of many counsel to make such an effort [to reproduce relevant parts of the record] imposes on us a burden of searching through transcripts and of sending for copies of exhibits not in the clerk's file which we ought not and ...cannot practically assume. It is not our intention to permit Rule 15(b) to be ignored as it now too often is, and we shall feel free to adopt appropriate sanctions

> for its violation, such as requiring the filing of proper appendices either before or after argument, disregarding portions of the transcript not reproduced, and, in cases of flagrant breach by appellant, dismissal of the appeal.

It can not be doubted that the Court has the power to dismiss an appeal or affirm a judgment of the District Court upon an appellant's disregard of the provisions of Rule 30. Walters v. Shari Music Publishing Co., 298 F.2d 206 (2nd Cir. 1962); Morrison v. Texas Co., 289 F.2d 382 (7th Cir. 1961); Sparrow v. Yellow Cab Co., 273 F.2d 1 (7th Cir. 1959).

In Walters, supra, the appellant had filed a six-page appendix which contained only a copy of two lower court opinions. The court noted that the appendix did not contain copies of the pleadings, a pretrial order, an additional lower court opinion or portions of affidavits relied upon on appeal. The Court found that there was "not even a token compliance with" the rule governing contents of the appendix. Walters, supra, at 207. The Court therefore specifield a date for filing by the appellant of a supplemental appendix and provided that if the appellant failed to file the appendix on the date specified, the appellee's motion to dismiss would be granted. Similarly in Morrison, where the appellant had been ordered to file a supplemental appendix, his failure to file an adequate supplemental appendix led to the dismissal of his appeal.

In a more recent case, MC Corp., Inc. v. Knowles Electric, Inc., supra, the Fourth Circuit dismissed an appeal where the appellant had failed to file an appendix and where "[p]ermission to dispense with an appendix was neither sought nor granted in accordance with Rule 30(E) [FRAP]." Id. at 1221.

Similarly, in United States v. Seaboard Coast Line Railroad, 517 F.2d 881 (4th Cir. 1975), the Fourth Circuit found that the appellant, the United States government, had "flagrantly violated" its duty to file an appendix, and granted the appellee's motion to dismiss, stating:

> The brief filed by the government purports to include an appendix, but the appendix fails to meet the minimum requirements of Rule 30(a). Although Rule 30(a) states that the appellant's appendix "shall"contain "(1) the relevant docket entries . . .; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other portions of the record to which the parties wish to direct the particular attention of the court," the appendix to the government's brief consists of two pages reproducing only two bills of lading. The government has neither sought nor obtained an order under Rule 30(c) which authorizes the filing of a deferred appendix, nor has it sought or obtained an order under Rule 30(f) authorizing an appeal to be heard on the original record. Id. at 882.

The Court granted the appellee's motion to dismiss despite the Government's contentions (1) that failure to file the appendix did not affect the jurisdiction of the Court, (2) that the issues on appeal were apparent from its brief and (3) that it had no objection to having the appellee file an appendix.

Against the background of these opinions and based on the clear import of the language of Rule 30(a) it is apparent that the Rule places on the appellant the burden of providing an appendix which represents a good faith effort to provide the Court of Appeals with adequate information concerning the District Court proceedings. In instances where the appellant has wholly failed to sustain his Rule 30(a) obligations and, in the words of this Court in Walters, supra, there is "not even token compliance with" the Rule, dismissal of the

appeal is appropriate.

In the instant case, the issue on appeal is whether the District Court properly granted the Defendants'12(b) Motion to Dismiss the complaint. Brophy's claim to a cause of action was that the existence of a New Hampshire statute which authorizes divorce for "irreconcilable differences" violates his First Amendment right to freedom of religion. No peculiarities of New Hampshire law which would alter the theory of his claim are alleged. Plaintiff simply claims that by making available a procedure by which citizens may dissolve marriages, the State of New Hampshire has violated his First Amendment rights to freedom of religion and the due process and privileges and immunities clauses of the Fourteenth Amendment. Such a claim is without merit. In any event, the issue cannot be dealt with adequately in the Court of Appeals without reference to, at a minimum, the Complaint and Defendants' Motion to Dismiss. Inasmuch as Appellant has failed to reproduce even these items in his Appendix, Appellees submit that dismissal of his appeal is appropriate.

CONCLUSION

The State of New Hampshire respectfully submits that the District Court's decision should be summarily affirmed for failure to observe the requirements of Rule 30 of the Federal Rules of Appellate Procedure. In the alternative, the Court should affirm the dismissal because the District Court lacked personal jurisdiction over the State of New Hampshire, venue did not lie in the District of Vermont and Plaintiff failed to state a claim upon which relief could be granted.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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CERTIFICATE

I hereby certify that a copy of the foregoing Brief has on this date been mailed, postage prepaid, to Norman Bernstein, Esquire, Attorney for Eldad M. Brophy, Robert Rachlin, Esquire, Attorney for Graper & Swanson Professional Association and Ann Brophy.

May 23, 1977

Deborah J. Cooper
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